



Final Regulation Agency Background Document

Agency name	Virginia Department for the Aging
Virginia Administrative Code (VAC) citation	22 VAC 5-30
Regulation title	The Virginia Public Guardian and Conservator Program
Action title	New Regulation
Date this document prepared	December 1, 2007

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

New Regulation

The Virginia Public Guardian and Conservator Program: This final regulation is proposed by the Virginia Department for the Aging (VDA) and sets forth requirements for a statewide program of local and regional Public Guardian Programs.

Based upon public comment, the proposed language has been amended to (1) clearly establish an ideal ratio of clients to paid staff of 20 incapacitated persons to every 1 paid full-time staff; (2) included language to address emergency of unusual circumstances for programs to voluntarily serve five additional persons; (3) included language requiring VDA, in consultation with the Advisory Board, to establish written procedures for public programs to obtain waivers regarding deviations in the ideal ratio of clients to paid staff; (4) Under *Appointments*, included language to address existing information available to assist the multidisciplinary panel in screening of cases for individuals receiving Case Management services through a Community Services Board (CSB) or Behavioral Health Authority (BHA); and (5) added language requiring multidisciplinary panels to affirmatively recommend limitations on the scope of guardianship, where appropriate, as part of the screening process. In addition to 1-5, some existing language has been amended or re-positioned to more clearly state the program's intent and duty to encourage incapacitated

persons to participate in decisions, to act on their own behalf, and to develop or regain the capacity to manage their personal affairs, where possible.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

New Regulation

The Virginia Department for the Aging submits this regulation for final adoption pursuant to the Code of Virginia authorization for a statewide public guardian program effective 1998. After considerable research, stakeholder input, and public comment during the preceding seven plus years, VDA is pleased to submit this regulation for final adoption, this day, November 30, 2007.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Statutory Authority for the Virginia Department for the Aging (VDA) to promulgate regulations is specified in § 2.2-712 of the Code of Virginia: Powers and duties of the Department with respect to public guardian and conservator program. The Code of Virginia mandates that the Department shall adopt reasonable regulations in accordance with the Administrative Process Act as appropriate to implement, administer and manage the state and local or regional programs authorized by this article.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The Virginia Public Guardian and Conservator Program: This regulation is proposed by the Virginia Department for the Aging (VDA) and sets forth guidance for a statewide program of local and regional public guardian programs.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

New Regulation. This regulation sets forth guidance for a statewide program of local and regional public guardian programs to ensure that eligible persons who cannot adequately care for themselves because of incapacity are able to meet essential requirements for physical and emotional health and management of financial resources with the assistance of a guardian or conservator or both, as appropriate, and that there are uniform standards throughout the statewide program.

Issues

Please identify the issues associated with the proposed regulatory action, including:
 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;
 2) the primary advantages and disadvantages to the agency or the Commonwealth; and
 3) other pertinent matters of interest to the regulated community, government officials, and the public.
 If there are no disadvantages to the public or the Commonwealth, please indicate.

This regulatory action poses no disadvantages to the public or the Commonwealth.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
5-30-30	Multidisciplinary panel (Client Screening)	Affirmative duty added to recommend the most appropriate limitations on the power of the guardian or conservator, if any, to ensure least restrictive.	Public Comment clarifies existing intent.
	Client Ratio to Paid Staff	*VDA established an ideal ratio of 20 incapacitated persons to every 1 paid staff (20:1) and deleted language allowing deviation up to 30:1 in Section 1	Agree with Public Comment
		*Flexibility added for programs to voluntarily serve up to 5 additional persons in emergency or unusual circumstances in Section 3.	Agree with Public Comment
		*VDA, in consultation with the Advisory Board, will establish written procedures for programs to obtain waivers regarding deviations in the ideal ratio in other than emergency or unusual circumstances as described above.	Agree with Public Comment
		VDA will report waiver requests and the status of granted waivers to the	Agree with Public Comment

		Advisory Board at its regularly scheduled meetings.	
	Appointments	*Added subsection "f" to address individuals who receive Case Management Services from a Community Services Board (CSB) or Behavioral Health Authority (BHA); allowing the multidisciplinary panel to request the results of the <i>determination of capacity</i> (12VAC35-115-145) and verification that no other person is available or willing to serve as guardian (12VAC35-115-146(E)).	Agree with Public Comment
	Services	Duty to encourage incapacitated person to participate in decisions, to act on his behalf and to develop or regain capacity to manage his personal affairs, to the extent feasible.	Public Comment (Repositioned existing language to clarify intent)
		End of Life Decision– amended language to include use of an <i>ethical decision-making process</i> expressed desires or personal values are unknown.	Agree with Public Comment
5-30-40	Personnel Standards	Staff training to include <i>an understanding of surrogate Decision Making and how it differs from Substituted Judgment</i> standards.	Agree with Public Comment
5-30-50	Record Keeping	Language amended to include a <i>similar comprehensive assessment instrument</i> when a UAI (Uniform Assessment Instrument) is unavailable.	Agree with Public Comment

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

15 Comments Received During Comment Period of 9/16/07 thru 11/16/07

Commenter	Comment	Agency response
1. Commonwealth Catholic Charities (Public Guardian Service)	Record Keeping The Uniform Assessment Instrument (UAI) required as client file documentation may not be available for those in MR (Mental Retardation) group homes.	VDA agrees. Language amended to include: <i>or a similar comprehensive assessment instrument.</i>

	<p>just those hired on or after 1/1/09.</p>	
<p>4. Erica Wood, Esq. 11/12/07</p>	<p><u>Client to Staff Ratio</u> Supports 20:1 Ratio Opposes 30:1 Ratio Deviation</p> <p><u>Personnel Standards</u> (1) For Program Directors, include requirement for a background in law, rather than merely guardianship-law. (2) For other staff, training should include Surrogate Decision making as opposed to Substituted Judgment.</p>	<p>See agency response to public comment (3) above.</p> <p>(1) VDA disagrees. This change would have a cost-impact on current programs.</p> <p>(2) VDA agrees. Language amended to: <i>4. Demonstrate, by objective criteria, knowledge of Virginia's guardianship laws and alternatives to guardianship. For each person hired on or after January 1, 2009, minimum education requirements apply and include a high school diploma or general education diploma (G.E.D.) from a Virginia accredited program and training or course work on (i) the duties and powers of guardians and conservators in Virginia, including an understanding of Surrogate Decision Making and how it differs from Substituted Judgment decision-making standards, (ii) mandatory reporting requirements to the Department of Social Services and Commissioner of Accounts where applicable, and (iii) working with special needs populations including individuals with physical and mental disabilities. Program Directors have additional requirements as specified in 22 VAC 5-30-30(C)(1).</i></p>
<p>5. VACSB (Virginia Association of Community Service Boards) 11/13/07</p>	<p><u>Programs</u> (1) "Limited Guardianships" should be used whenever possible;</p> <p>(2) Include references to Virginia Code and DMHMRSAS Human Rights regulations</p>	<p>(1) VDA agrees. Language amended to: <i>2. Each Public Guardian Program shall establish a multi-disciplinary panel to (i) screen cases for the purpose of ensuring that appointment of a guardian or conservator is appropriate under the circumstances and is the least restrictive alternative available to assist the incapacitated person. This screening shall include a duty to recommend the most appropriate limitations on the power of the guardian or conservator, if any, to ensure that the powers and duties assigned are the least restrictive, and ...</i></p> <p>(2) VDA agrees in part. Language amended to: <i>E. Appointments.</i> <i>1. Prior to the Public Guardian Program accepting an individual for services, the multi-disciplinary panel, described in 22 VAC 5-30-30(C)(2), shall screen referrals to ensure that:...</i> <i>f. In the case of an individual who receives Case Management Services from a Community Services Board (CSB) or Behavioral Health Authority (BHA), the multidisciplinary panel may also request the results of the "determination of capacity" as authorized by 12VAC35-115-145 (Determination of capacity to give consent or authorization) of the administrative Code of Virginia and verification that no other</i></p>

	<p>already in place for these individuals.</p> <p><u>Record Keeping</u> The Uniform Assessment Instrument (UAI) required as client file documentation should allow for a similar type of comprehensive assessment.</p>	<p>VDA agrees. Language amended to include: <i>or a similar comprehensive assessment instrument.</i></p>
<p>6. VNPP (Virginia Network of Private Providers, Inc.) 11/13/07</p>	<p><u>Adopts and supports comments made by VACSB, and:</u></p> <p><u>Programs</u> “Limited Guardianships”: Firm language needed to ensure use where appropriate; Existing DMHMRSAS Licensing and Human Rights regulations language should be incorporated where possible including the existing equivalent to the multidisciplinary panel already in use.</p>	<p>See agency response above for VACSB.</p>
<p>7. Family Service of Roanoke Valley (Current Public Guardian Service Provider) 11/13/07</p>	<p><u>Client to Staff Ratio</u> Supports 20:1 Ratio Opposes 30:1 Ratio Deviation</p>	<p>See agency response to public comment (3) above.</p>
<p>8. RRCSB-AAA (Rappahannock-Rapidan Community Services Board – Area Agency on Aging) 11/14/07</p>	<p><u>Adopts and supports comments made by VACSB.</u></p>	<p>See agency response above for VACSB.</p>
<p>9. RACSB Rockbridge Area Community Services Board (Although not mentioned, they also serve as a Public Guardian Program) 11/14/07</p>	<p><u>Adopts and supports comments made by VACSB.</u></p>	<p>See agency response above for VACSB.</p>
<p>10. Region 10 CSB-</p>	<p><u>Adopts and supports comments made by VACSB, and:</u></p>	<p>See agency response above for VACSB.</p>

<p>MR Council (Community Services Board, Mental Retardation Council) 11/14/07</p>	<p>1:20 ratio maximum should not be exceeded.</p>	<p>See agency response to public comment (3) above.</p>
<p>11. VPGCAB Virginia Public Guardian & Conservator Advisory Board) 11/14/07</p>	<p><u>Client to Staff Ratio</u> Strongly Supports 20:1 Ratio (National research and professional consensus cited supporting an optimal ratio of 20 clients to 1 paid staff. Strongly Opposes 30:1 Ratio Deviation as detrimental to legal nature and fiduciary requirements inherent in a Court-ordered appointment for Guardian and Conservators; the need for one single and unified public guardian program using uniform criteria throughout the Commonwealth.</p> <p><u>Other Comments</u> “Professional” Insert the word “professional” making the required ratio 20 incapacitated persons to every 1 paid <i>professional</i> staff person; Professional staff defined as staff that exercises decision-making authority for incapacitated persons.</p> <p>“Sufficient Contacts” language is not quantified and vague. The regulation should provide for monthly contact by paid, professional staff, and should indicate that contact must be in person.</p> <p>“Advisory Board Advice” Critical that Advisory Board be notified of any requests for a ratio deviation and have input before decisions are final to enable the Board to effectively <i>advise on the means for effectuating the purposes of the public Guardian and Conservator Program</i> as mandated by statute.</p> <p>“Deviation” and “Waiver” terms are not defined so clarity is needed; the Board recognizes that temporary</p>	<p>See agency response to public comment (3) above.</p> <p>VDA disagrees because this change could adversely impact current programs who use other <i>professional</i> staff to assist in filing Commissioner of Account Reports, Annual Reports to DSS and other legal duties that do not require Guardianship decision-making authority.</p> <p>VDA Agrees in part. This issue will be addressed in the Policies & Procedures Manual for Public Guardians and Conservators.</p> <p>VDA Agrees in part. Language amended to: <i>3...Other than an emergency or unusual circumstance as described in the preceding sentence, a waiver must be requested to exceed VDA’s established ideal ratio. VDA, in consultation with the Advisory Board, shall establish written procedures for Public Guardian Programs to obtain appropriate waivers regarding deviations in the ideal ratio of clients to paid staff. Procedures shall comply with §§ 2.2-712 and 2.2-713 of the Code of Virginia. VDA shall report waiver requests and status of granted waivers to the Advisory Board at its regularly scheduled meetings. VDA shall review such waivers each six months to ensure that there is no immediate threat to the person or property of any incapacitated person nor that exceeding VDA’s established ideal ratio is</i></p>

	unexpected fluctuations may by necessity occur whereby the ratio might be exceeded for a very brief and temporary period, and a short-term waiver may be required.	<i>having or will have a material and adverse effect on the ability of the program to properly serve all of the incapacitated persons it has been designated to serve.</i>
12. NWCSB Northwestern Community Services Board 11/16/07	<u>Adopts and supports comments made by VACSB.</u>	See agency response above for VACSB.
13. Chesterfield CSB (Community Services Board) 11/16/07	<u>Adopts and supports comments made by VACSB.</u>	See agency response above for VACSB.
14. BRBH Blue Ridge Behavioral Healthcare 11/16/07	<u>Adopts and supports comments made by VACSB & VNPP, and:</u> “Experience with Public Guardian Program” (Family Service of Roanoke Valley) has been positive; generally, the proposed regulation describe practices and controls currently in use “CSB/BHA Clients” Public guardian program will be enhanced by a recognition of the relationships and history that drive treatment and support services for the individual, a collaborative approach is critical.	See agency response above for VACSB. VDA agrees. VDA Agrees. This issue will be addressed in the Policies & Procedures Manual for Public Guardians and Conservators.
15. GOLD Guardian of Life’s Dreams (Public Guardian Service Provider) 11/16/07	<u>Client to Staff Ratio</u> Supports 20:1 Ratio Opposes 30:1 Ratio Deviation	See agency response to public comment (3) above.

Enter any other statement here

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale

No new section numbers have been added. No existing section numbers have been deleted. The regulation in its basic format remains consistent with the Proposed Stage except for those changes previously enumerated above.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

No viable alternative. The Code of Virginia requires regulatory action. § 2.2-712 of the Code of Virginia.

This regulation has been “in progress” for over seven years. In addition to research and study, considerable effort has been expended to ensure balance and fairness to current programs (avoidance of unnecessary restrictions and requirements), while also including safeguards to protect vulnerable incapacitated persons pursuant to Virginia law and established standards. Specifically:

1. Pursuant to Virginia Code authority, the regulation presented complies with the law and industry practice, including safeguards and flexibility. There is not a less stringent alternative.
2. In addition to regulatory requirements, VDA monitors programs annually, requires detailed quarterly reports, conducts mandatory training and maintains specific contractual obligations with each Service Provider.
3. N/A. VDA can not consolidate or simplify existing compliance or reporting requirements.
4. N/A.
5. N/A.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights

of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

Negligible. Persons served by the Virginia Public Guardian and Conservator Program do not have any other proper and suitable person, including family members, who are willing and able to serve in the capacity of guardian or conservator or both.